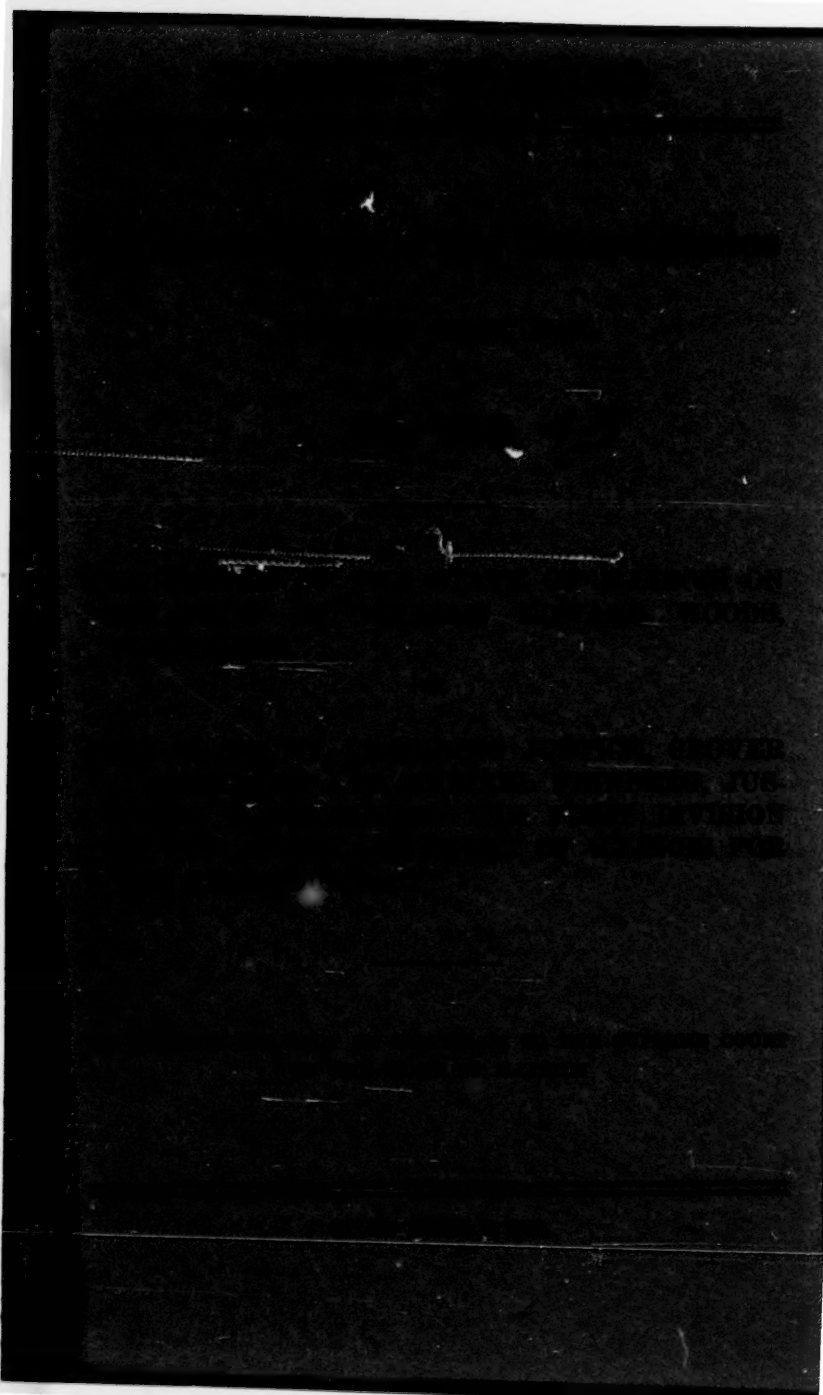

[fol. 1] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss.:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the fourteenth day of November in the year of our Lord, one thousand nine hundred and forty-nine, within and for the State of Illinois.

Present: Charles H. Thompson, Chief Justice; Justice Francis S. Wilson, Justice William J. Fulton, Justice Joseph E. Daily, Justice Walter T. Gunn, Justice Jesse L. Simpson, Justice Albert M. Crampton; Ivan A. Elliott, Attorney General; Harry G. Newman, Marshal.

Attest: Earle Benjamin Searcy, Clerk.

Be it remembered, that, to-wit: on the 31st day of December, A.D. 1949, the same being one of the days in vacation after the Term of Court aforesaid, there was filed in the Office of the Clerk of the Supreme Court a motion for leave to file an original petition for writ of mandamus in a certain cause entitled in this Court:

No. 31427

PEOPLE EX REL. WILLIAM EDWARD WOODS, Petitioner,

vs.

JOHN M. TOUHY, Presiding Justice, GROVER C. NIEMEYER and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents

MANDAMUS

which is in the words and figures following, to-wit:

[fol. 2] IN THE SUPREME COURT OF ILLINOIS

No. 31427

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS, Petitioner,

v.

JOHN M. TOUHY, Presiding Justice; GROVER C. NIEMEYER and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents

PETITION FOR LEAVE TO FILE APPLICATION FOR WRIT OF MANDAMUS

To the Honorable Justices of the Supreme Court of Illinois:

Your petitioner, The People of the State of Illinois on Relation of William Edward Woods, come and respectfully ask leave of this Honorable Court to file herein the annexed petition for preemptory writ of mandamus and that summons issue herein as provided by law.

The People of the State of Illinois on Relation of William Edward Woods, Petitioner, by Harry G. Fuerst and Schwartzberg & Barnett, by Mark T. Barnett, Attorneys for Petitioner, 77 W. Washington Street, Chicago 2, Illinois.

Filed Dec. 31, 1949. Earl Benjamin Searcy, Clerk.

[fol. 3] IN THE SUPREME COURT OF ILLINOIS

No. —

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS, Petitioner,

v.

JOHN M. TOUHY, Presiding Justice; GROVER C. NIEMEYER and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents

PETITION FOR MANDAMUS

To the Honorable Judges of the Supreme Court of Illinois:

Your petitioner, The People of the State of Illinois on Relation of William Edward Woods, respectfully represent unto your Honors as follows:

1. Your relator, William Edward Woods, is plaintiff and The New York, Chicago & St. Louis Railroad Company, a corporation, is defendant, in an action instituted by your relator in the Superior Court of Cook County, Illinois on the 23rd day of January, 1947, by filing a complaint in said Court in the words and figures as follows:

"Complaint At Law

Now comes William Edward Woods, plaintiff, by Harry G. Fuerst and Schwartzberg & Barnett, his attorneys, and complains of The New York, Chicago & St. Louis Railroad Company, a corporation, as follows:

(1) That the defendant is a railroad corporation, duly organized and existing under and by virtue of law, owning, maintaining and operating a system of steam railroads, a portion of which extends into and through the States of Ohio and Indiana and into the State of Illinois, and is doing business within the jurisdiction of this court as a common carrier of passengers and freight.

(2) That at the time of the accident and injuries hereinafter alleged, the plaintiff was employed by

the defendant as a road brakeman, and both plaintiff and defendant were engaged in interstate commerce.

(3) That plaintiff's action arises under the Act of Congress of April 22, 1908, 35 Stat. 63, Chap. 149 and amendments thereto, commonly known as the Federal Employers' Liability Act, 45 U.S.C.A. Secs. 51-60, and the Act of Congress of March 2, 1893, 27 Stat. 531, Chap. 196, and amendments thereto, commonly [fol. 4] known as the Federal Safety Appliance Act, 45 U.S.C.A., Sec. 11, as hereinafter more fully appears.

(4) That on the 14th day of November, 1946, at about 11:00 P.M., plaintiff was injured while so employed by the defendant, in the yard of the defendant at Fort Wayne, Indiana.

(5) That on said date plaintiff, in the performance of his duties as a road brakeman, was a member of the crew which was backing an engine and tender in order to couple to the balance of the train in defendant's yard. At the said time plaintiff was required to and did stand on the step of the tender on its right side, as the train proceeded westwardly around a curve, at a point where a spur track entered the track upon which the said train was proceeding. Defendant had spotted cars on the said spur track at a point where they extended partly into the right-of-way and failed to provide sufficient clearance for cars on the main track, as a result of which plaintiff came in contact with the said standing cars and was knocked from the tender to the ground, causing the injuries hereinafter set forth.

(6) That prior to and at the time of the occurrence herein set forth, the plaintiff was in the exercise of due care and caution for his own safety.

(7) That at the time and place aforesaid the injuries to the plaintiff were caused by the carelessness and negligence of the defendant, its agents and employees in the following respects:

(a) It failed to provide the plaintiff with a reasonably safe place in which to work.

(b) It spotted the standing cars too close to the main track so that there was not sufficient clearance provided for the plaintiff and other employees similarly situated, in the normal use of the main track, in violation of the established rule, custom and practice then and there existing.

(c) It failed to give the plaintiff adequate and sufficient warning of the presence of the said cars standing so close to the said track and of the absence of sufficient clearance thereof.

(d) It caused, suffered and permitted the cars to be placed on the spur track in too close proximity to the main track so as not to afford sufficient clearance for this plaintiff and other lawfully engaged in the line of duty and work for this defendant, necessitating the use of the main track, as aforesaid.

(e) It failed to have proper and adequate control of said cars that were placed on said spur track, in that it failed to provide and maintain good and substantial hand brakes and caused said hand brakes to be applied and remain applied, so as to prevent said cars from drifting towards the main track, thereby creating a condition of close clearance that prevented this plaintiff and others from safely performing their duty as aforesaid.

[fol. 5] (f) In failing to provide proper and adequate and sufficient lighting in said yard, so as to enable this plaintiff to continue to perform his work in safety, and to see the position of the cars on the spur track, in dangerous close proximity to the main track, prior to being struck by them.

(8) That by reason of the defendant's violation and negligence as aforesaid, and as the sole, direct and proximate result thereof, plaintiff's body was crushed, lacerated and contused both externally and internally, causing him to become sick, sore, lame and disabled and he will continue to be sick, sore, lame and disabled for the remainder of his life. He suffered and will continue to suffer great physical pain and mental anguish. In addition thereto, plaintiff suf-

fered aggravation and activation of previously existing abnormal physical conditions, from which he had completely recovered at the time of the said accident and injury and this injury, superimposed upon the previous injuries to plaintiff's body, have been and become completely disabling.

As a result thereof plaintiff has undergone and endured severe and excruciating mental and physical pain, suffering and inconvenience and will continue so to do for the remainder of his life; that the aforesaid injuries are permanent and will permanently disable him and require him to obtain and receive hospital and medical care and attention; that his said injuries have definitely impeded his ability to walk, stand or sit and that such impediments will continue for the remainder of his life.

Prior to being injured as aforesaid, the plaintiff was a strong, active, able-bodied man, earning and capable of earning substantial wages as a road brakeman, but as a direct result of the occurrence hereinbefore set forth, he has lost wages and earnings which he otherwise would have acquired and is totally and permanently disabled for performing the duties of his former railroad occupation or engaging in any other form of physical labor.

By reason whereof the plaintiff has been damaged in the sum of One Hundred Thousand Dollars ($100,000.00)

Wherefore plaintiff prays judgment in favor of the plaintiff and against the defendant in the sum of One Hundred Thousand Dollars ($100,000.00).

Harry G. Fuerst and Schwartzberg & Barnett,
Attorneys for Plaintiff."

(Trial by Jury Demanded).

2. The defendant in said action, the New York, Chicago & St. Louis Railroad Company, duly appeared therein and filed its answer to your relator of said complaint in the words and figures as follows:

[fol. 6] "Answer

Now comes the defendant, The New York, Chicago and St. Louis Railroad Company, a corporation, by

Winston, Strawn & Shaw, its attorneys, and for answer to the complaint heretofore filed herein states as follows:

1. That it admits the allegations contained in paragraph (1) of plaintiff's complaint.

2. That it admits that on the 14th day of November, 1946, the plaintiff was employed by the defendant as a road brakeman; but denies the balance of paragraph (2) of plaintiff's complaint.

3. That it denies the allegations contained in paragraphs (3), (4), (5), (6), (7) and each sub-paragraph thereof, and (8).

Wherefore, defendant prays for judgment in its favor.

Additional Defenses

For further defenses in its behalf, this defendant alleges that:

1. The defendant was guilty of no negligence which was a proximate cause of the occurrence in question.

2. The proximate cause of the occurrence in question was the negligence of the plaintiff.

3. The contributory negligence of the plaintiff contributed to cause the occurrence in question.

Winston, Strawn & Shaw, Attorneys for The New York, Chicago, and St. Louis Railroad Company."

3. Your relator duly filed his reply in said action in the words and figures as follows:

"Reply to Answer of The New York, Chicago & St. Louis Railroad Company, a Corporation

Now comes William Edward Woods, plaintiff herein, by Harry G. Fuerst and Schwartzberg & Barnett, his attorneys, and in reply to said Answer the plaintiff herein says:

1. Plaintiff denies all allegations of new matter contained in the Answer of the defendant.

2. Plaintiff further specifically denies the allegation contained in paragraph 1 under the caption of "Additional Defenses" of said Answer, that the defendant was guilty of no negligence which was a proximate cause of the occ-rrence in question, but states the fact to be that the accident and injuries as set forth in said Complaint, were caused by defendant's violation of the Federal Statutes pleaded therein, and by reason of defendant's negligence as in said Complaint set forth.

[fol. 7] 3. Plaintiff further specifically denies the allegation contained in paragraph 2 under the caption of "Additional Defenses" of said Answer, that the proximate cause of the occurrence in question was the negligence of the plaintiff, but states the fact to be that prior to and at the time of the occurrence in said Complaint set forth, plaintiff was in the exercise of due care and caution for his own safety, and was not negligent in any respect.

4. Plaintiff further specifically denies the allegation contained in paragraph 3 under the caption of "Additional Defenses" of said Answer, that the contributory negligence of the plaintiff contributed to cause the occurrence in question, but states the fact to be that prior to and at the time of the occurrence in said Complaint set forth, plaintiff was in the exercise of due care and caution for his own safety and was in no respect guilty of contributory negligence, and further states the fact to be that the accident and injury set forth in the plaintiff's Complaint was occasioned by defendant's violation of the Federal Statutes pleaded therein, and the negligence of the defendant, as in said Complaint set forth.

Wherefore, Plaintiff demands judgment against the Defendant in the sum of One Hundred Thousand Dollars ($100,000.00)"

4. Your relator duly demanded a trial by jury of the issues in said action in which your relator is plaintiff and The New York, Chicago, & St. Louis Railroad Company, a corporation, is defendant.

5. The issues in said action duly came on for trial and were tried in the Superior Court of Cook County before

the Honorable Wilbert F. Crowley, Judge Presiding, and a jury on May 4 to May 7, 1948, and after such trial and on May 7, 1948, the jury duly rendered a verdict in favor of your relator and against the defendant, The New York, Chicago & St. Louis Railroad Company, for the sum of Forty Thousand Dollars ($40,000.00), and judgment was duly entered on said verdict on May 7, 1948, in the words and figures as follows:

"Judgment

On motion of Harry G. Fuerst and Schwartzberg & Barnett, Attorneys for William Edward Woods, Plaintiff herein, due notice having been given to the Attorney for the defendant and the Court being fully advised in the premises,

It is Hereby Ordered that the amendment to the complaint submitted this day be and the same is hereby ordered filed herein instanter.

It is Further Ordered that the complaint at Law be and the same is hereby amended as follows:

Now comes William Edward Woods, plaintiff, by Harry G. Fuerst and Schwartzberg & Barnett, his Attorneys, and amends his complaint at law as follows:

[fol. 8] After the words, Sec. 11, in the fifth line of paragraph three of said complaint, insert the following:

and the act of Congress of February 17, 1911, 36 Stat. 913, Chap. 103 and amendments thereto, commonly known as the Federal Boiler Inspection Act. 45 U. S. C. A. Secs. 17-34.

Insert in paragraph 7 following the sub-paragraph (f) thereof as follows:

That at the time and place complained of the defendant failed to fulfill its statutory duty as required by the provisions of the Federal Boiler Inspection Act in this to-wit:

(g) If used or permitted to be used on its line a locomotive which said locomotive, its boiler, tender parts and appurtenances thereto, were not safe to

operate without peril to the life and limb of the plaintiff.

It is Further Ordered that the defendant be permitted to file its amendment to its answer instanter and the same is hereby ordered filed herein.

It is Further Ordered that the defendant's answer stands to the complaint as amended.

Now on this day again come the parties hereto and by their Attorneys respectively and the jury heretofore impaneled herein for the trial of said cause also come and after hearing all of the evidence adduced say, "We, the jury, find the defendant guilty and we assess the plaintiff's damages at the sum of $40,000.00." Judgment is now entered upon said verdict.

Whereupon it is considered by the Court that the plaintiff, William Edward Woods, do have and recover of and from the defendant, The New York, Chicago, and St. Louis Railroad Co., his said damages of $40,000.00 in form as aforesaid by the jury assessed, together with his costs and charges in this behalf expended and have execution therefor.

Enter: (S.) Wilbert F. Crowley, Judge."

Dated: May 7th, 1948.

6. Thereafter, the defendant, The New York, Chicago & St. Louis Railroad Company, filed a notice of appeal from said judgment to the Appellate Court of Illinois for the First District, and said appeal was duly assigned to the First Division of said Court and was heard by the Honorable John M. Touhy, Presiding Justice, the Honorable Grover C. Niemeyer, Justice, and the Honorable Michael Feinberg, Justice, constituting the First Division of the Appellate Court of Illinois for the First District, the relators herein.

[fol. 9] 7. On November 21, 1949 the Appellate Court of Illinois for the First District of the First Division thereof, constituted as aforesaid, handed down and filed an opinion and decision on said appeal in the words and figures as follows:

"44745

"William Edward Woods, Appellee,

v.

The New York, Chicago & St. Louis Railroad Company, a Corporation, Appellant

Appeal from Superior Court, Cook County

Mr. Justice Niemeyer delivered the opinion of the Court.

Defendant appeals from a judgment for $40,000 entered on a verdict in a personal injury action brought under the Federal Employers' Liability Act (45 U. S. C. A.) secs. 51-59), Federal Safety Appliance Act (45 U. S. C. A. sec. 11), and, by amendment made during the trial, the Federal Boiler Inspection Act (45 U. S. C. A. sec. 23).

Plaintiff was injured in defendant's Fort Wayne, Indiana yard on November 14, 1946 at about 11:50 p. m. in the performance of his duties as a road brakeman, engaged with his crew, consisting of an engineer, fireman, conductor and another brakeman, in backing an engine and tender on a main track (O. P. Main) in order to couple to an interstate train made ready by yard switchmen for movement to Bellevue, Ohio by plaintiff's crew. The main track runs east and west and the engine was backing toward the west. A spur track came off the main track at an angle toward the south and west. Plaintiff was on a stirrup on the southwest corner of the tender. When close to the junction with the spur track he saw a coal car spotted near the main track and attempted to get around the corner of the tender to a wheel on the back. He was brushed off as the tender passed the coal car and sustained injuries for which he brought suit. Defendant admits its liability under the Federal Employers' Liability Act in failing to provide the plaintiff with a reasonably safe place in which to work and in failing to provide sufficient clearance between the spotted coal car and the moving engine and tender. It denies liability under the Safety Appliance and Boiler Inspection acts. As defined by instructions

to the jury given at plaintiff's request, defendant's liability under the first of the two acts last mentioned is based on its alleged failure to provide efficient hand brakes on the coal car, and under the second act upon its alleged failure to equip the rear of the tender with an efficient and properly focused light.

On appeal defendant's principal contentions are, that the court erred in giving instructions permitting recovery under the Safety Appliance and Boiler Inspection acts because there is no evidence of the violation of either, and, that the damages awarded are excessive.

The testimony relating to the brakes on the coal car is limited to plaintiff's statement that on going to work around 9:15 to 9:30 p. m. he saw a coal car on the spur track about 10 feet from the switch and that a regular [fol. 10] yard brakeman was setting the brake. As stated in *Myers* v. *Reading Co.*, 331 U. S. 477, cited by plaintiff, there are two recognized methods of showing the inefficiency of hand brake equipment—adducing evidence to establish some particular defect, or, showing a failure to function, when operated with due care, in the normal, natural and usual manner. Plaintiff makes no claim under the first method. The evidence fails utterly to meet the requirements of the second. The court takes judicial notice that a car on a sloping track will move downward unless an efficient hand brake is properly applied or set. No inference of inefficiency of the brake can be drawn from the mere fact that plaintiff saw a switchman setting the brake—an incomplete operation —when the car was 10 feet from the switch and that several hours later the car was so near the main track as to interfere with the operation of engines and cars on it. It must first be shown that the brake was actually set, with due care and in a normal, natural and usual manner. It must also be shown that the slope of the spur track was such as to cause a spotted car to move or drift toward the main track unless an efficient brake was properly set. The burden of making this proof was upon plaintiff. As conceded upon oral argument, defendant is under no obligation to adduce any evidence until plaintiff has made a prima facie case. Plaintiff did not make the necessary proof. The only evidence as to a slope of the spur track is the testimony of three

members of plaintiff's crew, who testified as follows: The conductor said the spur slopes to the west; the fireman that it is an incline to the west. An incline is a slope. (Century Dictionary.) The same authority defines slope, a verb, as "to bend down, direct obliquely, incline, slant," and slope, a noun, as "an oblique direction, obliquity, slant, especially a direction downward." Plaintiff used slope in the sense of a direction downward when he testified that a car on a slope would drift if the brake was defective. Drift of the coal car toward the main track was impossible under the uncontradicted evidence that the spur track sloped to the west and away from the main track. Plaintiff's counsel now claim that no proof was required because of admissions by defendant's counsel in his opening statement. The language relied upon is: "Now I notice what Mr. Fuerst said on how the car got there. I do not know if it was put there or whether it had drifted there. In other words, if the brakes were defective in holding the car." "I do now know" is not an admission of facts as to which counsel declares his lack of knowledge.

In support of his action under the Boiler Inspection act plaintiff testified that the light on the rear of the tender was out of focus, throwing its rays up instead of down toward the track. Members of plaintiff's crew contradict this testimony, and an issue of fact to be determined by the jury was created if this alleged defect in the light can be made the basis of an action under the Boiler Inspection act. Under that act the Interstate Commerce Commission is empowered to make rules and regulations by which the fitness for service of a locomotive, its boiler, tender and all parts and appurtenances thereto shall be determined. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605. These regulations have the force of law and are judicially noticed. *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481. Strict compliance with the rules and specifications of the commission is fulfilment of the carrier's duty. *Auschwitz* v. *Wabash Ry. Co.*, 346 Ill. 190; *Mahutga* v. *M. St. P. & S. S. M. Ry. Co.*, 182 Minn. 362; *A. T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471. Rule 129 (a) of the Interstate Commerce Commission prescribes specifications for the headlight on a locomotive used in road service.

129(b) is as follows: 'Each locomotive used in road service, which is regularly required to run backward for [fol. 11] any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear (a) headlight which shall meet the foregoing requirements.' Rule 131 of the commission, relied upon by plaintiff, is limited to lights on locomotives used in yard service and it has no application to the present case because the movements of the engine on which plaintiff was riding were not in yard service. In an instruction approved by the Supreme Court in *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, movements of an engine in a yard to classify cars and make up a train were held to be in yard service, but movement of a road engine backing into a siding for the purpose of getting out of the way of the yard engine was not a movement in yard service. Here the interstate train to which the engine with which plaintiff was working was to be attached had been made up by the yard crew. Plaintiff's engine was backing up to couple to the train and move it to Bellevue, Ohio. Its movements were within the exceptions stated in 129(b) supra, and no headlight was required. Defendant being under no obligation under the Boiler Inspection act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the act, was not properly focused. No claim can be made that the projection of the rays of this light into the air created an "unnecessary peril to life or limb" in the operation of the engine.

Giving the instructions permitting recovery under the Safety Appliance and Boiler Inspection acts requires a reversal of the judgment. Plaintiff's contributory negligence, if any, was a matter for the jury. Under the acts last mentioned it cannot be asserted as a defense or in mitigation of damages. It must be considered in reduction of damages under the Federal Employers' Liability Act. The damages awarded are large and it may be that the jury, relying on the instructions relating to the Safety Appliance and the Boiler Inspection acts, failed to consider the question of contributory negligence in making the award.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and Remanded.

Tuohy, P. J., and Feinberg, J., concur."

8. On the trial of said action in the Superior Court of Cook County, the jury at the conclusion of all of the evidence was instructed by the Court in writing as follows:

On behalf of the plaintiff:

1

"Under the law the plaintiff is a competent witness to testify in his behalf in this suit. The jury should not disregard the plaintiff's testimony merely because he is the plaintiff and interested in your verdict, but you should construe his testimony in connection with all the evidence in the case and give his testimony such weight and credit as you believe it entitled to from all the facts and circumstances in evidence.

2

The Court instructs the jury that on the 14th day of November, 1946, there was in full force and effect an Act entitled, "Federal Employers' Liability Act," a Statute of the United States of America, a section of which reads as follows:

[fol. 12] 'Every common carrier by railroad while engaging in commerce, between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances * * * or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, effect such commerce as above set forth shall, for the purposes of

this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.'

"If you find from the preponderance or greater weight of the evidence that at the time of the injuries complained of by the plaintiff, William E. Woods, that the plaintiff and the defendant were engaged in interstate commerce and transportation, and, if you further find from the preponderance or greater weight of the evidence that the defendant hauled or used or caused to be placed upon one of its spur tracks adjacent to the O. P. main track where the plaintiff was required to work, a car or cars equipped with inefficient hand brake or brakes, their parts and appurtenances, and if you further find from the preponderance or greater weight of the evidence that the failure of the defendant to so maintain upon its said car or cars efficient hand brakes, their parts and appurtenances, proximately contributed to cause injuries to this plaintiff, or, if you find from the preponderance or greater weight of the evidence that the defendant used, or permitted to be used upon its line, a locomotive, boiler, tender and all parts and appurtenances thereof, in a condition unsafe to operate in the service to which the same were put and which caused unnecessary peril to life and limb of this plaintiff, and if you further find from the preponderance or greater weight of the evidence that such failure on the part of the defendant proximately contributed to cause injuries to this plaintiff, or if you find from the preponderance or greater weight of the evidence that the defendant negligently and carelessly failed to provide this plaintiff with a reasonably safe place in which to work, and if you find that any one or all of the above acts of the defendant directly and proximately caused injuries, if any, to this plaintiff, then you may consider that the foregoing Federal Act is applicable to this case.

3

This action is brought by William Edward Woods, as plaintiff, against the New York, Chicago & St. Louis Railroad Company, defendant, to recover damages for a violation of three acts of Congress known as the Fed-

eral Employers' Liability Act and the Federal Safety Appliances Act and the Federal Boiler Inspection Act.

4

It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and, having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected body and series, and should be so regarded and treated by the jury, that is to say, they should apply them to the facts [fol. 13] as a whole, and not detach or separate any one instruction from any or either of the others.

5

The Court instructs the jury that the negligence of the defendant is the proximate cause of an injury if it can properly be said to produce the result complained of in a natural and continuous sequence unbroken by any efficient intervening cause.

6

Under the provisions of the Federal Boiler Inspection Act, it is the defendant's duty to furnish a locomotive, its boiler, tender, and all parts and appurtenances thereof, in proper condition and safe to operate in the service to which the same are put, and that may be employed in active service, without unnecessary peril to life and limb.

If you find from a preponderance or greater weight of the evidence that at the time of the injuries complained of by the plaintiff, William E. Woods, that the plaintiff and the defendant were engaged in interstate commerce and transportation, and if you further find from the greater weight of the evidence that to equip such locomotive and tender with such a light caused, or proximately contributed to cause unnecessary peril to the life and limb of the plaintiff and made the said locomotive unsafe to operate in the service to which such locomotive and tender were put, you may then find that the defendant has violated the Federal Boiler Inspection Act; and if you further find that the furnishing of such locomotive and tender with a light

that was dim and out of focus directly and proximately caused injuries to be sustained by this plaintiff, William E. Woods, then, even though you may find from the greater weight or preponderance of the evidence that the plaintiff was guilty of contributory negligence, the Federal Boiler Inspection Act denies to the defendant, and deprives the defendant of the defense of contributory negligence on the part of the plaintiff and such contributory negligence, if any, will not act as a bar nor diminish the right of the plaintiff to recover full damages for such injuries, if any, he has sustained.

7

Under the provisions of the Federal Safety Appliance Act it is the defendant's duty to provide safe and efficient hand brakes, parts and appurtenances, on all cars used or hauled on its railroad.

If you find from a preponderance or greater weight of the evidence that at the time of the injuries complained of by the plaintiff, William E. Woods, that the plaintiff and the defendant were engaged in interstate commerce and transportation, and if you further find from the greater weight of the evidence that the defendant failed to equip the cars used or hauled over its line of railroad and standing upon its spur track with efficient hand brakes, if you further find from the greater weight or preponderance of the evidence, that the omission to have efficient hand brake or hand brakes, their parts and appurtenances, on the cars standing upon the spur track of the defendant adjacent to the O.P. main track upon which this plaintiff was required to work, and such omission directly and proximately caused said cars to drift or move from the position that they originally occupied when the said brakes were set, to a place where they would foul the O.P. main track, and that such failure or omission directly and [fol. 14] proximately caused injuries to be sustained by the plaintiff, William E. Woods, then even though you may find from the greater weight or preponderance of the evidence that the plaintiff was guilty of contributory negligence, the Federal Safety Appliance Act denies to the defendant, and deprives the defendant of the defense of contributory negligence on the part of the plaintiff, and such contributory negligence, if any, will

not act as a bar to plaintiff's right to recover full damages for such injuries, if any, he has sustained.

8

Ordinary care is that degree of care that the ordinarily prudent man would use under the same or similar circumstances.

9

You are instructed that if you find for the plaintiff, from the greater weight of the evidence and under the instructions of the court, you will be required to determine the amount of his damages. If you find from the greater weight of the evidence, that defendant violated the Federal Safety Appliance Act or the Federal Boiler Inspection Act and the Federal Employers' Liability Act, or all of them, and such violation or violations, directly and proximately caused injuries, if any, to this plaintiff, you should determine the full amount of the damages, if any, suffered by this plaintiff directly and proximately in consequence of his injuries, if any; and you should find the damages, if any, to be such a sum of money as will fairly and adequately compensate him for his injuries, if any. In determining the amount of such damages, if any, it is your duty to take into consideration his age, earning capacity, and the character, extent, and severity of such injuries, if any; the pain and suffering he has endured, if any, and the pain and suffering that it is reasonably certain he will endure, if any; and such disability, if any, as he has suffered or will hereafter suffer; you should take into account and consideration the extent to which he has been incapacitated to work, if any, and earn money in consequence of such injuries, if any; you should take into consideration the amount of the wages which plaintiff has lost from the time he was injured up to the present time, if any, directly and proximately in consequence of said injuries, if any, and the amount of earnings it is reasonably certain from the evidence he will lose in the future in consequence of said injuries, if any.

10

You are further instructed that if you do not find that the defendant has violated the Federal Safety Ap-

pliance Act or the Federal Boiler Inspection Act but do find that the defendant has violated only the Federal Employers' Liability Act, and you further find from the greater weight of the evidence that the plaintiff was contributorily negligent and that the combined negligence of the plaintiff and the defendant was the proximate cause of the accident in question and the resultant damages, if any, to the plaintiff, then in that event the full amount of damages sustained by the plaintiff are not recoverable by him, but he shall be entitled to recover only the proportionate amount thereof bearing the same relation to the full amount of damages sustained by him as the negligence attributable to the defendant bears to the entire negligence attributable to both.

11

The jury is instructed that the preponderance of the evidence in a case is not necessarily alone determined by the number of witnesses testifying to a particular fact or set of facts. In determining the preponderance of evidence, the jury may take into consideration the number of witnesses testifying upon one side or the other of a disputed point; the opportunity of the wit- [fol. 15] nesses for seeing or knowing the things about which they testify; their candor or lack of candor; their interest or lack of inter-st, if any, in the result of the suit; the probability or improbability of the truth of their several statements, and from all of these circumstances, together with all the other facts and circumstances proved upon the trial, determine upon which side is the greater weight or preponderance of the evidence.

12

Preliminary to your being accepted and sworn to act as jurors in this case you were examined by both plaintiff and defendant as to your competency and qualifications to act as jurors in this case. As a part of such examination each of you answered all questions asked you by both plaintiff and defendant. Your answers showed you were competent and qualified to act as jurors and the parties to this suit accepted you as jurors on the faith of your answers. The answers you then made to said questions in regard to your competency,

qualification, fairness, lack of prejudice and freedom from passion and sympathy are as binding on you now as they were then, and should so remain until you are finally discharged from further consideration of the case. It would be improper for you to disregard those answers that rendered you competent jurors.

13

The Court instructs the jury that any and all preparatory movements in aid of interstate commerce are a part of interstate commerce irrespective of whether a specific train is being prepared at the time. If you believe from a preponderance of the evidence under the instructions of the Court that at the time of the accident and injury complained of by the plaintiff in this case he was then and there engaged in performing a service for the defendant which in any way directly or closely and substantially affected such commerce, then you may find that the plaintiff at said time and place was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

The plaintiff by its counsel, requested the Court to give, the Court refused to give, and plaintiff objected and excepted to such refusal, the following instruction:

14

The court instructs the jury that if, under the evidence and under the other instructions herewith given you, you find in favor of the plaintiff, then you will assess his damages at such sum as you find and believe from the evidence will reasonably compensate him on the basis outlined in another instruction herewith given you.

In computing the damages, if any, that a person is entitled to for pain and suffering, and mental anguish, or for injuries to the person, the law has no standard by which to go. This is a matter for the jury to decide by the exercise of sound judgment and discretion. It is not a power left to the jury, to be exercised arbitrarily, and you have no right to award anything in the nature of a punishment or penalty. If you decide that the plaintiff is entitled to a verdict, it is your duty to

try and make him whole, as far as money consideration can do so, but you should give nothing further than a just and reasonable compensation for the injuries, if any, sustained by plaintiff.

[fol. 16] And you are further instructed that it is improper for you to arrive at a verdict by first agreeing that each juror will set down the amount, if any, which he may be in favor of awarding the plaintiff, divide the aggregate by the number of jurors, if any, concurring in such verdict and that the result thus obtained should be the verdict of those jurors, and you should not enter into any such agreement.

In following this instruction you may determine and agree among yourselves as to the amount to be awarded for each separate item of proven damage, if any, and then add all of these items of damages, if any, together and assess this amount as your verdict.

It would not be improper for each of you to write down on paper the amount which each of you may evaluate each separate item of damages, if any, nor is it improper for each of you to add up such items of damage, if any, in order to guide you in arriving at a verdict."

On behalf of the defendant:

1

"You are instructed that while the law permits the plaintiff in this case to testify in his own behalf, nevertheless, you have the right in weighing his evidence to determine how much credence is to be given to it, to take into consideration the fact that he is the plaintiff and interested in the result of the suit.

2

With respect to the ailments and disabilities claimed by the plaintiff in this case, the law requires him to prove by a preponderance or greater weight of the evidence not only that such ailments or disabilities exist or have existed, but also that they are the result of the accident in question. You have no right to guess or con-

jecture merely that any ailment or disabilities complained of by the plaintiff were the result of the accident in question, but before he can recover for such ailments or disabilities he must prove by a preponderance or greater weight of evidence that they do proceed from and are the result of the accident in question. The burden is not upon the defendant to show that they arise from any other cause, and even if the evidence is evenly balanced between the plaintiff and the defendant on such question, you cannot allow the plaintiff for any such ailments or disabilities which are not proved by a preponderance or greater weight of the evidence to be the result of the accident in question.

3

The Court instructs the jury that in considering and arriving at your verdict in this case, the jurors are not to compromise between the question of liability, if any, and the amount of damages, if any, nor are they to arrive at a verdict by chance; and no juror should consent to a verdict which does not meet with the approval of his or her own judgment and conscience, after due deliberation with his fellow jurors and fairly considering all the evidence admitted by the Court and the law as given in the instructions of the Court.

4

It is your duty to consider this case and all its bearings the same as you would a case between two private citizens instead of a case in which a railroad corpora- [fol. 17] tion is a defendant. Railroad corporations are entitled to the same fair and unprejudiced treatment in courts of law as private citizens would be under like circumstances. Sympathy, from whatever source it may come, should have no influence upon you in determining whether the defendant is liable, or, if liable, control in any way your verdict. Both questions of liability and damages are to be determined from the evidence and under the instructions of the Court. Prejudice, sympathy, or any other outside matter should not affect your judgment. In other words, it is your duty to give every question in the case a calm,